IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21880

WALTER LEWIS GRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Southern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to perform civilian work, as ordered), Universal Military Training and Service Act [Tr. 32].[1]

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1. Tr.—refers to Transcript of Record.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [Tr. 33].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to do civilian work, as ordered [Tr. 2].

Appellant pleaded "not guilty" and was tried by the Honorable Jesse W. Curtis, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [Tr. 32].

A written motion for judgment of acquittal was filed during the trial [Tr. 22].

THE FACTS

On June 16, 1964, appellant filed his Classification Questionnaire (SSS Form No. 100) and signed series VIII [Ex. 7][2] indicating he was a conscientious objector.

He was mailed the Special Form for Conscientious Objector (SSS Form No. 150) and timely returned it, fully executed [Ex. 15-18]. In this form he showed he believed

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2. Ex. refers to the government's exhibit, the complete Selective Service System file of the appellant.

in a Supreme Being and showed that his religious beliefs took precedence over any earthly command [Ex. 15-18].

He presented evidence showing he was a minister, in said conscientious objector form, and in other documents [Ex. 19, 21, 22, 23, 25, 26, 53, 69].

Nevertheless, despite anything in the file to the contrary, or in existence, he was classified in Class I-O. He asked for an Appearance and presented evidence he was a minister, showing it was his vocation [Ex. 19-26].

The local board and his appeal board rejected his minister claim but the appeal board reclassified him as a conscientious objector.

He was ordered to do civilian work but refused.

QUESTIONS PRESENTED

I

Was the denial of the minister's claim without basis in fact?

This question was raised by the Motion for Judgment of Acquittal [Tr. 22].

II

Was the work to which he was ordered appropriate? This question was raised by the motion [Tr. 22].

SPECIFICATION OF ERROR

I

The District Court erred in denying the Motion for Judgment of Acquittal.

SUMMARY OF ARGUMENT

I

Appellant made out a prima facie case as a minister. The task of the court is to search the record for some affirmative evidence to support the local board's denial of IV-D classification to appellant. The record in this case is barren of any such evidence. *Dickinson* v. *United States,* 74 S. Ct. 152 (1953).

ARGUMENT

I

The Draft Board Violated Defendant's Rights under the Act and the Regulations to Have His Claim for a Minister's Classification Considered Because It Completely By-Passed and Skipped Consideration of His Evidence.

The evidence shows appellant presented a *prima facie* case for a IV-D classification (minister's status). No contrary evidence, if any existed, was ever placed in the file. Therefore, he should have been classified in Class IV-D. It was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. *Dickinson* v. *United States,* 74 S. Ct. 152.

The applicable regulation of the Selective Service System, 32 C.F.R., Sec. 1623.2, requires that a registrant be classified in the "lowest" class, according to a table which places IV-D "lower" than I-O.

> 1623.2 Consideration of Classes.—Every registrant shall be placed on Class I-A under the provisions

of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following tables:

Class:		Class:	
	I-A-O		IV-B
	I-O		IV-C
	I-S		IV-D
	I-Y		IV-F
	II-A		IV-A
	II-C		V-A
	II-S		I-W
	I-D		I-C
	III-A		

The regulation governing classification of registrants presenting evidence for a minister's status is 32 C.F.R. § 1622.43.

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of Title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

"Sec. 16. When used in this title— * * * (g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly

or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

It is thus evident that "vocation" is the chief consideration. "Full-time" is nowhere mentioned; nor is "part-time" mentioned. Nor is the word "Pioneer" or any equivalent expression used. Neither hours of activity nor clerical title are recognized by the Act or the regulations as factors in classifying.

II

The Work to Which Appellant Was Ordered Was Inappropriate in That It Involved Elements Contrary to His Religion.

Appellant was ordered to do his civilian work at the Los Angeles County Department of Charities [Ex. 72]. Before being so ordered the State Director has asked the Director for such authority, stating that the work was "suitable." [Ex. 68]. The director approved [Ex. 67].

We do not contend that this work did not meet all the statutory requirements, in general.

We contend that it was not suitable, in particular, that is, as an assignment to this appellant.

The law provides that work assigned shall be "appropriate." [32 C.F.R. § 1660.1]. Where the registrant does not agree to the type suggested to him by the Selective Service System an arbitration-type of meeting is arranged [32 C.F.R. § 1660.20(c)].

Our first complaint is that the work chosen by the local board, and without the consent of the registrant, was in his own community, a violation of Section 1660.21(a), in that the local board did not make the specific finding required. See Exhibit 64 and 65. The section involved reads as follows:

> 1660.21 General Provisions Relating to Orders by the Local Board to Perform Civilian Work and Performance of Civilian Work.—(a) No registrant shall be ordered by the local board to perform civilian work in lieu of induction in the community in which he resides unless in a particular case the local board deems the performance by the registrant of such work in the registrant's home community to be desirable in the national interest.

Our next objection is that the work chosen did not fit his special abilities. He pointed out, in the form sent him by the local board to so state, that his special training was in the field of accounting work, for the Bureau of Public Assistance [Ex. 55]. Although such work was available [Ex. 55] it was not selected by the board.

Our final objection is that the work ordered involved duties contrary to his religious beliefs. Although the reporter's transcript is not available, as this brief is written, the records of this Court consistently show (1) the beliefs of the Jehovah's witnesses and (2) the condition at the

particular place where the appellant was ordered to perform his work. For example, see *Langhorne* v. *United States,* No. 21910, where the testimony showed that the work interfered with his religious (ministry) commitment because of the hours (Rep. Tr. p. 8, lines 5-). On cross-examination he spelled out the religious work he did: "I have five meetings a week that I attend, besides going in the field service. These five meetings are on Tuesday, Thursday, and Sunday, and they are from 8:00 until 9:00 on Thursday, and from 6:30 until approximately 8:45 on Sunday, and, see, this would be interfering with this because I would be on call all the time. One week I would have to miss all my meetings until they rearranged it, until I worked on the day shift." [Rep. Tr. 9, line 19].

Langhorne also showed that the work offered would involve handling blood, contrary to his religious belief and the well-known beliefs of the Jehovah's witnesses [Rep. Tr. 3/21-].

Work religiously objectionable has been held inappropriate for the alternate service contemplated by Congress.

In *United States* v. *Copeland,* D. Conn. 1954, 126 F. Supp. 734, it was held that work that adversely affected the religious beliefs of a registrant was inappropriate.

Likewise, in *United States of America, Plaintiff* v. *George Donald Sparks, Defendant,* Criminal No. IP-54-CR-30 decided by Honorable William E. Steckler, district judge, Southern District of Indiana, Indianapolis Division on February 11, 1955, the court held that the work to which Sparks had been ordered "clashed with those of sectarian principles of the defendant" and therefore acquitted him.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to grant the petition for writ of habeas corpus.

Respectfully submitted,

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Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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OCTOBER 20, 1967